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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

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9 UNITED STATES OF AMERICA,

Plaintiff,

Case No. 3:18-cr-00019-LRH-CLB

10 v.

SEALED ORDER

11 STONEY PRIOR,

12 Defendant.  
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14 Before the Court is Defendant Stoney Prior's *ex parte* application and affidavit in support  
15 of the issuance of subpoenas pursuant to Federal Rule of Criminal Procedure 17(a) and 17(b) AND  
16 Local Rule of Criminal Practice 17-1, filed under seal. ECF No. 183-s.<sup>1</sup> For the reasons contained  
17 within this Order, the Court Orders the subpoenas issued with the modifications contained herein.

18 **I. BACKGROUND**

19 On September 3, 2020, the Grand Jury returned a superseding indictment on two counts of  
20 Second-Degree Murder Within Indian Country, pursuant to 18 U.S.C. §§ 1111, 1151, 1153, for  
21 the killings of A.S. and A.H., two Native American women on the tribal lands of the Fort  
22 McDermitt Indian Reservation on or about January 31, 2018. ECF No. 105. Trial is now set for  
23 August 9, 2021, with jury selection to take place in Elko, Nevada, on August 5 and 6, 2021. ECF  
24 No. 178.

25 On December 10, 2020, Defendant filed an *ex parte* application and affidavit in support of  
26 the issuance of subpoenas. ECF No. 180-s; corrected ECF No. 183-s. The proposed subpoenas  
27 requested the production of medical records of Delores Abel. Ms. Abel is a now-deceased  
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<sup>1</sup> The "-s" designates that the filing is under seal.

1 government witness who testified at a Rule 15 deposition on September 21, 2020. During the  
2 deposition, Ms. Abel articulated that she had stage IV cancer, and had come directly from the  
3 hospital to testify. ECF No. 183-2-s at 22, 25. She also indicated that she was on pain medications,  
4 though she could not recall the specifics of the medications, and was currently in pain as she was  
5 testifying. *Id.* at 17, 22.

6 Having concerns regarding this subpoena, the Court ordered the Defendant to show cause  
7 why (1) Ms. Abel's medical records are not protected by HIPAA and doctor-patient  
8 confidentiality; (2) Defendant's request for her medical records over a three year period is not  
9 overly broad; (3) Ms. Abel's estate and/or legal representative should not be given notice and the  
10 opportunity to object to the requested subpoena before it is issued; and (4) the Government should  
11 not have the option to respond and argue against this subpoena. ECF No. 184-s. The Court further  
12 Ordered that Defendant show cause why any part of Ms. Abel's medical history is relevant and  
13 material to this case, and necessary to an adequate defense. *Id.* Defendant responded arguing that  
14 neither HIPAA nor physician-patient privilege protects Ms. Abel's medical records; that there is  
15 no requirement that Ms. Abel's estate be given notice or an opportunity to object to the requested  
16 subpoena; and that Ms. Abel's prescription drug use is relevant and material as it relates to her  
17 credibility and impeaching the reliability of her testimony. ECF No. 185-s.

## 18 **II. LEGAL STANDARD**

19 Prior filed his application for subpoena under Federal Rule of Criminal Procedure 17,  
20 which governs issuance of subpoenas in criminal proceedings. Rule 17(a) states that a subpoena  
21 "must state the court's name and the title of the proceeding, including the seal of the court, and  
22 command the witness to attend and testify at the time and place the subpoena specifies." Rule  
23 17(b) permits *ex parte* applications "if the defendant shows an inability to pay the witness's fees  
24 and necessity of the witness's presence for an adequate defense." This District has previously  
25 stated that "the *ex parte* nature of a Rule 17(b) application serves to put a defendant on equal  
26 footing with the Government because the Government is not required to give a defendant notice  
27 as to those witnesses that it intends to subpoena to testify at trial." *United States v. Sellers*, 275  
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1 F.R.D. 620, 622 (D. Nev. 2011) (quoting *United States v. Reyes*, 162 F.R.D. 468, 469 (S.D.N.Y.  
2 1995)).

3 Rule 17(c)(1) governs the production of documents and objects, and provides:

4 A subpoena may order the witness to produce any books, papers, documents, data,  
5 or other objects the subpoena designates. The court may direct the witness to  
6 produce the designated items in court before trial or before they are to be offered in  
evidence. When the items arrive, the court may permit the parties and their  
attorneys to inspect all or part of them.

7 Although Rule 17 is not a discovery device, it may be used to obtain evidentiary materials.  
8 *Sellers*, 275 F.R.D. at 622-23 (citing *United States v. Nixon*, 418 U.S. 683, 689, 699-700 (1974)).  
9 Leave of the court is required for a pretrial subpoena under Rule 17(c)(1) in criminal proceedings.  
10 *Id.* at 623. Granting a pretrial subpoena under Rule 17(c)(1) is “committed to the sound discretion  
11 of the trial court since the necessity for the subpoena most often turns upon a determination of  
12 factual issues.” *Nixon*, 418 U.S. at 702.

### 13 **III. DISCUSSION**

14 The Court finds that Defendant has met his burden of establishing that the requested  
15 documentation is not otherwise procurable by Defendant prior to trial and that the application was  
16 made in good faith. The Court also finds that the application and supporting affidavit were  
17 appropriately filed *ex parte* and should remain sealed to protect the mental impressions and trial  
18 strategy of defense counsel.

19 The Court agrees that the requested medical information is not protected by HIPAA or by  
20 physician-patient evidentiary privilege, as none exists in federal common law. *See Whalen v. Roe*,  
21 429 U.S. 589, 602 n.28 (1977) (“The physician-patient evidentiary privilege is unknown to the  
22 common law.”). HIPPA permits disclosure of medical records for judicial proceedings in response  
23 to court order. 45 C.F.R. § 162.512(e). While the covered entity may disclose these records without  
24 written authorization from the individual subject of the disclosure or giving the individual an  
25 opportunity to agree or object to the disclosure, the Court may still require that such notice be  
26 given. *See Reed v. Williams*, Case No. CIV S-05-0060 RRB GGH P., 2007 WL 2140506, at \* 7  
27 (E.D. Cal. July 25, 2007). The Court finds that notice to Ms. Abel’s estate and/or representative  
28 and an opportunity to object to the requested subpoena is appropriate in this circumstance.

1 Finally, while the Defendant has established that at least on some level, Ms. Abel's  
2 prescription drug history is relevant, the Court is not convinced that Ms. Abel's entire medical  
3 history for a 34-month period is. Accordingly, the Court shall limit and modify the requested  
4 subpoena to only her prescription drug history and only for the days her credibility and reliability  
5 of her testimony is to be tested: January 31, 2018 (the day of Prior's alleged confession to her);  
6 February 1 and 2, 2018 (the days she was interviewed by officers); and September 21, 2020 (the  
7 day of her Rule 15 deposition). This necessarily will likely include a 30-day period of use as  
8 Defense articulates that most Schedule II drugs are prescribed in 30-day amounts without refills.  
9 While Defendant cites *Hutton v. City of Martinez*, 219 F.R.D. 164 (N.D. Cal. 2003), in support of  
10 his request for Ms. Abel's entire medical record for the 34-month period, the Court finds the  
11 circumstances of that case are inapposite to the issue at hand: a prescription Ms. Abel may have  
12 been taking during the 31 months between her statements has not been shown to be relevant to  
13 whether she made credible and reliable statements on the dates in question.

14 Accordingly, the Court will exercise its wide discretion and grant Defendant's application  
15 for subpoenas with the above modifications.

#### 16 **IV. CONCLUSION**

17 IT IS THEREFORE ORDERED that Defendant's *ex parte* motion for a subpoena (ECF  
18 No. 180-s, corrected at ECF No. 183-s) is **GRANTED**.

19 IT IS FURTHER ORDERED that a subpoena be issued for the witnesses named below,  
20 and that the fees and expenses for the witnesses so subpoenaed shall be paid as if subpoenaed on  
21 behalf of the Government, the Court being satisfied that the Defendant is financially unable to pay  
22 the fees and expenses of this witness and the presence of this witnesses is necessary to an adequate  
23 defense.

24 IT IS FURTHER ORDERED that the persons to whom the subpoena is directed shall  
25 produce the names and doses of any prescription medication that Delores Renae Abel (DOB:  
26 8/11/1967; SSN: 537-94-9688), was prescribed for use on the following days: January 31, 2018,  
27 February 1 and 2, 2018, and September 21, 2020.

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1           **Witnesses:**

2           1. Custodian of Records  
3           Dr. Tejvir Singh  
4           Cancer Care Specialists  
5           5423 Reno Corporate Drive  
6           Reno, NV 89511

7           2. Custodian of Records  
8           Renown Hospital  
9           850 Harbor Way  
10          Mail Code B3  
11          Reno, NV 89502

12          IT IS FURTHER ORDERED that defense counsel shall serve Ms. Abel's estate and/or  
13          representative with the issued subpoena and this Order and her estate and/or representative is  
14          advised that they have the right to object to production of Ms. Abel's medical records. If they  
15          desire to object, they should file a written objection with the Court setting forth their specific  
16          objections no later than **Monday, February 15, 2021.**<sup>2</sup> The Court will expeditiously consider and  
17          rule on any objections prior to disclosure of the subpoenaed information. This Order is **SEALED**;  
18          therefore, the information contained within this Order and the attached subpoena are not to be  
19          disclosed to the Government.

20          IT IS FURTHER ORDERED that all documents shall be deposited with the Clerk of Court,  
21          see note 2, who shall hold the records for *in camera* review. If the Court finds that disclosure is  
22          appropriate, it will inform the parties that the documents are available and permit counsel for both  
23          sides to inspect them, as contemplated by Rule 17(c)(1). The Court will also fashion a protective  
24          order for any medical information disclosed.

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30          <sup>2</sup> Please mail objections and subpoenaed materials with a copy of the subject subpoena to:  
31          Clerk of Court, Attn Katie Ogden  
32          U.S. District Court for the District of Nevada  
33          400 S. Virginia St.  
34          Reno, NV 89501

1 IT IS FURTHER ORDERED that the application on this matter and this Order are hereby  
2 **SEALED** until further order of the Court.

3 IT IS SO ORDERED.

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5 DATED this 15th day of January, 2021.

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LARRY R. HICKS  
7 UNITED STATES DISTRICT JUDGE  
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